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**IN THE
COURT OF APPEALS OF INDIANA**

SHAWN COLWELL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A05-0604-CR-225

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable David Happe, Judge Pro Tempore
Cause No. 48D01-0509-FB-277

January 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Shawn Colwell (“Colwell”) appeals his convictions for Burglary as a Class A felony, Battery as a Class A misdemeanor, Criminal Confinement as a Class D felony, and Robbery as a Class B felony. We affirm in part, reverse in part, and remand with instructions.

Issues

Colwell raises two issues, which we restate as:

- I. Whether Colwell’s conviction for Criminal Confinement as a Class D felony in conjunction with his simultaneous conviction for Battery as a Class A misdemeanor violate the Indiana Constitution’s prohibition against double jeopardy; and
- II. Whether the forty-year advisory sentence, with five years suspended, is inappropriate.

Facts and Procedural History

On September 6, 2005, while Charles Green (“Green”) was sitting on the living room couch in his girlfriend’s Anderson home watching television, Colwell and three other individuals entered through the front door, without first knocking, and demanded marijuana. After Green responded that he did not use marijuana anymore, Green shoved Colwell. In response, Colwell punched Green twice on the side of the head, knocking him to the floor. Colwell, straddling Green, continued to punch him on the side and back of the head, pinning Green to the floor.

Tina Patrick (“Patrick”), Green’s girlfriend, entered the room, prompting Colwell to stop hitting Green. Green attempted to get up, but was struck twice in the mouth by one of

Colwell's accomplices, Brandon Campbell ("Campbell"), knocking out two of Green's teeth. Patrick attempted to call 911 on her cell phone, but was thwarted by Campbell. Campbell then grabbed Patrick from behind, hooking his arm around Patrick's neck, and threw her to the ground. After further struggle, Patrick was finally able to exit the house and call 911. During the incident, Patrick's two children and two nephews were in the house and witnessed part of the altercation.

Colwell and his accomplices left shortly after Patrick was able to exit the house. Before leaving the house, they took a PSP video game, two packs of cigarettes, a Zippo lighter, and Patrick's cell phone.

The police were able to locate and arrest Colwell and Campbell shortly after receiving Patrick's 911 call. The State charged Colwell with Burglary as a Class A felony,¹ Robbery as a Class B felony,² Criminal Confinement as a Class D felony,³ and Battery as a Class A misdemeanor.⁴ After a jury trial ending on March 16, 2006, Colwell was found guilty as charged. The trial court sentenced Colwell to forty years for burglary, twelve months for battery, twenty-four months for criminal confinement, and fifteen years for robbery. These sentences were to be served concurrently. The trial court suspended five years resulting in a total executed sentence of thirty-five years. Colwell now appeals.

Discussion and Decision

¹ Ind. Code § 35-43-2-1.

² I.C. § 35-42-5-1.

³ I. C. § 35-42-3-3.

I. Double Jeopardy

On appeal, Colwell first argues that the enhancements of his burglary and robbery convictions are a double jeopardy violation as well his convictions for battery and confinement. Article I, Section Fourteen of the Indiana Constitution provides that “no person shall be put in jeopardy twice for the same offense.” Our Supreme Court has held that two convictions are the “same offense” in violation of Article I, Section 14 of the Indiana Constitution if, “with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

The State concedes that the enhancements of Colwell’s convictions for burglary and robbery are based on the same bodily injury inflicted upon Green. This dual use of evidence to enhance both convictions does not constitute double jeopardy because each crime includes evidence or facts not essential to the other. Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002).

However, it would violate a doctrine within the long adhered to rules of statutory construction and common law. Id. This doctrine instructs that where a burglary conviction is elevated to a Class A felony based on the same bodily injury that forms the basis of a Class B robbery conviction, the two enhancements cannot stand. Id. Accordingly, we remand for the robbery conviction to be reduced to a C felony.

We now turn to Colwell’s “actual evidence” argument in which Colwell contends that

the same evidentiary facts alleged to constitute confinement were not separate from those used to support the count of battery.

Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Richardson, 717 N.E.2d at 49. An identification of the evidentiary facts used by the jury in reaching its decision may be informed by consideration of the final jury instructions and argument of counsel. Bruce v. State, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001), trans. denied. The “reasonable possibility” standard permits convictions of multiple offenses committed as part of a protracted criminal episode provided the case is prosecuted in a manner that insures the same evidence is not used to support multiple verdicts. Id. Our first task in this analysis is to determine whether there was actual evidence presented at trial that the trier of fact could have used to independently establish the essential elements of the separate offenses. Id. If independent evidence was lacking, then the Indiana Double Jeopardy Clause has been violated. Id. If such evidence was presented at trial, we proceed to determine which of the evidentiary facts the trier of fact used in reaching its decision. Id.

To establish criminal confinement, the State is required to prove that a person knowingly or intentionally confined another person without the other person’s consent. Ind. Code § 35-42-3-3(a)(1). For battery as a Class A misdemeanor, the State must show that a

⁴ I.C. § 35-42-2-1.

person knowingly or intelligently touched another person in a rude, insolent, or angry manner that resulted in bodily injury to any other person. I.C. § 35-42-2-1(a)(1)(A). Colwell's action of straddling Green and repeatedly punching Green satisfies all of the requirements for both crimes.

The State argues that there is independent evidence because Colwell hit Green twice, collapsing Green to the floor before taking the separate action of pummeling Green to keep him down. The purpose of the "reasonable possibility" test is to allow multiple convictions stemming from a protracted criminal episode. Only seconds elapsed between Colwell's first two punches and the following litany of blows. Colwell was simply repeating the same action from a different angle. Furthermore, the prosecutor made no attempt to distinguish this alleged independent evidence supporting each crime in his closing statement.⁵ Hence there was a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of the battery count may also have been used to establish the essential elements of the criminal confinement count. Therefore, we find that Colwell's convictions of Battery as a Class A misdemeanor and Criminal Confinement as a Class D felony violate the Indiana Double Jeopardy Clause. On remand, the conviction for Battery as a Class A misdemeanor should be vacated.

II. Appropriateness of Sentence

Colwell received a forty-year advisory sentence, with five years suspended, for Burglary as a Class A felony, Indiana Code Section 35-43-2-1, but argues that the trial court

improperly relied on juvenile offenses that did not result in convictions as an aggravator. Pursuant to Indiana Appellate Rule 7(B), he seeks revision of his sentence. Indiana Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due considerations of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”

In general, sentencing determinations are within the trial court’s discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). Indiana Code Section 35-38-1-7.1(b) provides that the court may consider mitigating circumstances. However, “[a] court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana, regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” I.C. § 35-38-1-7.1(d).

“Because the new sentencing statute provides a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the sentencing range for the particular offense.” Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). The sentence imposed upon Colwell was within the Class A felony sentencing range of between twenty and fifty years.

At sentencing, the trial court specifically found aggravators and mitigators in accordance with Indiana Code Section 35-38-1-3, which provides in relevant part:

The court shall make a record of the [sentencing] hearing, including:

(1) a transcript of the hearing;

⁵ The prosecutor used the same “left, right, left, right” description in reviewing the evidence supporting the battery charge and the confinement charge.

- (2) a copy of the presentence report; and
- (3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes.

In imposing a sentence in excess of the advisory term of thirty years, the trial court found in aggravation that “1) defendant has a history of criminal or delinquent activity; 2) the violence committed by the defendant occurred in the presence of small children; 3) there are multiple victims and multiple charges of which the defendant was found guilty. The Court finds mitigation: the defendant has expressed remorse for his involvement in the Instant Case.” Appellant's Appendix at 177.

The trial court's sentencing statement assists our review by providing a basis for the trial court's sentencing determination; however, we are not constrained to consider only those factors in evaluating the appropriateness of a sentence. See McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006). On appeal, Colwell alleges that at the sentencing hearing the trial court improperly referenced his juvenile offenses that did not result in conviction.

In the sentencing hearing, the trial court found that Colwell has a “history of criminal and delinquent activities, a long history, a number of contacts, as the prosecutor mentioned, a lot of those were not reduced to conviction, but some of them were found to be true as a juvenile, including an assignment to the Department of Corrections Boys School.” A history of arrests may be considered relative to one's character. Tunstall v. State, 568 N.E.2d 539, 545 (Ind. 1991). In addition to the delinquent activities not reduced to convictions from his juvenile record, as an adult Colwell has been convicted of possession of marijuana, criminal conversion, leaving the scene of an accident, and at the time of trial had pending charges for

theft as a Class D felony and Battery as a Class A misdemeanor. Criminal charges which are pending at the time of a defendant's sentencing hearing may be properly considered as an aggravating circumstance. Id. Colwell's history of arrests, convictions, and pending charges at the time of his sentencing do not militate toward a lesser sentence.

Furthermore, Colwell does not challenge the other two aggravators found by the trial court. Colwell has not persuaded us that his forty-year sentence, with five years suspended, should be revised for inappropriateness.

Conclusion

We conclude that Colwell's conviction for robbery was improperly enhanced by evidence of the same bodily injury used to enhance the burglary conviction. We also conclude that Colwell's convictions of battery and confinement violate the Indiana Constitution's prohibition of double jeopardy, because there is a reasonable probability that the jury used the same evidence to find both convictions. Accordingly, we direct the trial court to reduce the robbery conviction to a C felony and vacate the battery conviction. Finally, Colwell has not established that his forty-year sentence, with five years suspended, is inappropriate.

Affirmed in part, reversed in part, and remanded with instructions.

VAIDIK, J., and BARNES, J., concur.